possesses no peculiar immunity against equitable defences, as between the original parties, this case stands, primarily, the same as if the note were sued in the name of the original payee.

In such a case it is unquestionably equitable, for the mortgage to be deducted from the price, and only the remainder enforced against the purchaser. This will in fact, reach the exact justice of the case and save circuity of action by means of the vendor's covenants of warranty. But still no such defence is strictly allowable at law. There being no fraud in the case there is no ground to claim a rescinding of the contract: *Thornton* v. *Wynn*, 12 Wheat. 183; *West* v. *Cutting*, 19 Vt. 537. The breach of the covenants of warranty of title, can at most, only show a partial failure of consideration of the notes, and one which the parties provided for in their contract by the covenants in the deed. Unless, therefore, the purchaser had paid off the encumbrance before suit brought upon the notes, he could not enforce a set-off by means of the breach of the covenants. The only remedy would be in a court of equity. And here the remedy is ample, provided the counter claims are in fact mutually in equity, although not so in form, or at law. Equity will, in such cases, always interfere in case of insolvency: *Blake* v. *Langdon*, 19 Vt. 485, where the cases are carefully cited and compared. The result of which is: 1. That courts of equity decree set-off, anterior to and independent of the statutes of set-off: *Ex parte Stephens*, 11 Vesey 24; *Ex parte Blagden*, 19 Id. 465; *Hawkins* v. *Freeman*, 2 Eq. Cas. Ab. 10, pl. 10. 2. That after the statute of set-off, 2 Geo. 2 and 5 Geo. 2, the courts of equity conformed their practice to the statute, except in cases of special equity: *Ex parte Quintin*, 3 Ves. 248. Cases of insolvency, and where otherwise one party will pay more than he really owes, and be left remediless, have always been regarded as justifying the interference of courts of equity to decree set-off. And other equitable grounds of interference are numerous: *Dale* v. *Cook*, 4 Johns. Ch. 13; 2 Story Eq. Jur., § 1432 *et seq.* Equity too might divide the debt of the appellant, and enable him to first pay the mortgage, then pay the remainder to the appellee: *Ex parte Quintin*, *supra*. How far the debtor's declaration will estop him from making the defence, is mainly matter of construction by the court, and is not liable to review. But it is obvious here that the appellant's language receives a very mild construction. We might about as well, as it seems to us, come to the opposite conclusion: See *Strong* v. *Ellsworth*, 26 Vt. 366.

I. F. R.

Circuit Court of the United States, Eastern District of Virginia.

AUGUSTUS HANCOCK ET UX. *v.* NEW YORK LIFE INSURANCE COMPANY.

The intervention of the late war was a sufficient excuse to the holder of a policy of life insurance, for not paying his premiums as they accrued during the war, the insurer being resident and domiciled upon one side of the military lines, and the insured upon the other.

A contract may be broken before the time for its performance arrives, by a party to it repudiating its obligation and declaring that he will not perform what he has bound himself to do.

Therefore, where H. was insured before the war, and paid up his premiums regularly and duly until the war, but was separated from the insurer during the period of the war by the military lines, and as soon as possible after the restoration of peaceful relations, offered to pay to the insurer all premiums that were accumulated, and to continue paying all such as should accrue, but the insurer refused to receive them, and repudiated all obligation under the contract; *Held*, that H. became thereupon immediately entitled to an action against the insurer for such interest as he might show that he had acquired in the policy, although the policy was payable at the time of his death, and although he was not dead.

In the year 1851, Augustus Hancock insured his life with the defendant, in the sum of $5000, payable to his wife at his death, he, Hancock, agreeing to pay the defendant $142 annually at Richmond, Va., by way of premium on the same. He paid his premiums regularly until the war, when the defendant removed its agency from Richmond, and had no agency within the military lines of the Confederate States during the war. As soon after the war as the defendant re-established an agency in Richmond, Hancock went to it and offered to pay up all his premiums that had accumulated during that period, and offered to continue to pay all such as should accrue in the future. But the defendant refused to receive his premiums, and declared the contract at an end, upon the ground that all his rights under it had been forfeited by his failure to pay his annual premiums as they fell due, between the years 1861 and 1865. And they at the same time required him to take notice that they were under no obligations whatever to him in respect of said policy. The plaintiff's declaration set out the case as stated above.

The defendant demurred to the declaration upon two grounds: 1st. That the failure to pay the anual premiums as they accumulated, forfeited the plaintiff's rights under the policy, and 2d, That, though this were not so, yet no sufficient breach of the contract was alleged, as the time when the contract was to be performed had not yet arrived.

Johnston, *Williams* and *Boulware*, for the demurrer.

Wm. L. Royall, for the plaintiffs.

On the first point see *Manhattan Life Ins. Co.* v. *Warwick*, 20 Gratt. 614; *New York Life Ins. Co.* v. *Clopton*, 7 Bush (Ky.) 179; *Hamilton's Ex'ors* v. *The Mutual Life Ins. Co.*, 9 Blatch. 234.

Upon the second point: It is settled now, that a contract may

be broken before the time for its performance arrives, by one party disclaiming its obligation, thereby giving the other party the right to treat it as though the time for its fulfilment had passed: Chitty on Contracts, 10th Am. ed. 799; *Hochster* v. *De La Tour*, 2 Ellis & B. 678; *Frost* v. *Knight*, Law Reports, 7 Exch. 111; *Avery* v. *Bowden*, 5 Ellis & B. 714; *Danube & Black Sea Co.* v. *Xenos*, 13 C. B. N. S. 825; *Dugan* v. *Anderson*, 36 Md. 567; *Mountjoy* v. *Metzger*, 12 Am. Law Reg. N. S. 442.

It is true it has been many times decided that when a promise is made to pay money on a certain day, no action will lie until the day has passed. As, for instance, if A. buy a horse from B., and promise to pay him $100 for the same one year from that day, no action will lie for the $100, until the year has passed, and this is what was held by TANEY, C. J., in the case of *Greenway* v. *Gaither*, Taney's Decisions 227, with the leading case of *Hoch ster* v. *De La Tour* before him. But there is a radical distinction between such a case and the case at bar. Where a promise is made to pay money at a future day, as in the illustration in regard to the purchase of a horse, *time* is of the essence of the contract.

But time is not what is stipulated for by the insurer in a policy of insurance. What he stipulates for is *money*. He promises to pay the insured $5000, provided the insured will pay him $142 every year that he, the insured, shall live. And if the insurer get that number of annual payments, it is of no consequence to him at what time he pays the $5000, and he will have got all that he stipulated for. The plaintiff ought then to recover in this case $5000, less as many annual premiums as have accrued since the beginning of the war up to this time, and less as many more as will accrue during such time as a jury may think the plaintiff will live. Each party will then receive what he originally contracted to get, and no injustice will be done to any one.

The demurrer was overruled, and at the trial, BOND, Circuit J., instructed the jury as follows:—

"If the jury find that the defendant, The New York Life Ins. Co., did insure the life of Augustus Hancock, for the term of his natural life, and for the benefit of Sarah A. Hancock, as set out in the policy of insurance offered by the plaintiff in evidence; and if the jury find that the said Sarah A. Hancock complied with the terms of said policy on her part to be performed by the payment

of the annual premium of $142 to the agent of said company, until the said agency was withdrawn by the company because of the outbreak of hostilities, and if the jury find that within a reasonable time after the close of hostilities and the re-establishment of the company's agency at Richmond, the plaintiffs offered to pay the premiums fallen due during the war, but that the company refused to receive such premiums unless the said Hancock would submit to a medical examination for a new policy, and wholly refused to be bound by said contract of life insurance, then the plaintiff is entitled to recover such damages as they may find, from the evidence in the cause, the plaintiffs have suffered by reason of the defendant's breach of contract."

The jury found a verdict for plaintiff for $1371.

Supreme Judicial Court of Maine.

THE STATE v. LOUIS H. F. WAGNER.

All parts of the state are included within the body of one or another of the several counties into which the state is divided.

When murder has been done in an unincorporated place, publicly and commonly known by name, in any one of these counties the venue is well laid, and the place sufficiently described, if the crime be charged in the indictment as having been committed at (insert the name by which the place is commonly known) a place within the county of (name of county) aforesaid, in the absence of anything tending to show that the prisoner would be embarrassed in the preparation of the defence for want of a more particular description.

When there is no controversy as to the precise spot on the face of the earth where the crime was committed, and it appears by ancient charters, legislative enactments and judicial records that the political authorities of the state and county have heretofore claimed and exercised jurisdiction over the locality in question, the question of jurisdiction is one of law for the court, and the defendant cannot in any stage or form of pleading rightfully claim to have it submitted to the jury as one of fact, for their determination.

Upon such a question the presiding judge in addition to the matters of which he will take judicial notice, such as legislative enactments, ancient charters, and geographical position, may refresh his recollection and guide his judgment by reference to the records of the courts in the county where he sits, general histories of deceased authors of established reputation, and the records of the census of the inhabitants of the county taken under the laws of the United States by its officers.

It is competent for the assistant United States marshal who took the census for the district, and made the return to the office of the clerk of the courts for the county, when the record does not show the specific locality where the individuals enumerated resided, to testify as to their place of residence.

When the political authorities of a state have actually claimed and exercised